United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1373

To be argued by
MICHAEL C. EBERHARDT

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1373

UNITED STATES OF AMERICA,
Appellee,

—v.—

FRANK SACCO and BENJAMIN GENTILE,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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TABLE OF CONTENTS

TABLE OF CASES

PAGE

PAGE

OTHER AUTHORITIES

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Preliminary Statement

Frank Sacco and Benjamin Gentile appeal from judgments of conviction entered on June 9, 1976 and July 29, 1976, respectively, in the United States District Court for the Southern District of New York, after a two week trial before the Honorable Lee P. Gagliardi, United States District Judge, and a jury.

Indictment 72 Cr. 332, in eight counts, was filed on March 23, 1972. Count One charged Sacco with making an extortionate extension of credit of $500 on March 16, 1970 to James "Sonny" Robbins, in violation of Title 18, United States Code, Sections 891 and 892. Count Two charged Sacco and Gentile with making an extortionate extension of credit of $1000 to Robbins on May 5, 1970 in violation of Title 18, United States Code, Sections 891, 892 and 2. Count Three charged Sacco, Gentile and co-

defendant John Rhines with conspiring to participate in the use of extortionate means to collect extensions of credit from Robbins, in violation of Title 18, United States Code, Sections 891 and 894. Count Four charged Sacco and Gentile with the use of extortionate means on June 5, 1970 to collect extensions of credit from Robbins, in violation of Title 18, United States Code, Sections 891, 894 and 2. Counts Five through Eight charged Sacco, Gentile and Rhines with the use of extortionate means to collect extensions of credit from Robbins on December 6, 1971, December 10, 1971, January 3, 1971 and January 21, 1972, respectively, in violation of Title 18, United States Code, Sections 891, 894 and 2.

Trial began on September 13, 1972 and ended on September 26, 1972 when the jury convicted Sacco and Gentile on Counts Two through Eight and Rhines on Counts Three and Five through Eight.*

On June 9, 1976, Rhines was sentenced to concurrent terms of incarceration for a period of a year and a day on Counts Three and Five through Eight. This sentence was later reduced to probation for a period of one year. Also on June 9, 1976, Sacco was sentenced to concurrent terms of twenty years' imprisonment on Counts Two through Eight. On July 29, 1976 Gentile was sentenced to concurrent terms of fifteen months on Counts Two through Seven and to two years' probation on Count Eight.**

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* Count One was dismissed at the close of the Government's case since the proof had shown that Robbins was not in fear of Sacco on the date of the initial $500 loan to Robbins as charged in that Count. (Tr. 217, 815).

** The delay in Sacco's and Gentile's sentencing was primarily attributable to the resolution of post trial motions which alleged that the Government's prosecution was tainted by illegal New York State wiretaps. Similar motions were filed and litigated

[Footnote continued on following page]

Only Gentile and Sacco appeal their convictions. Gentile is at liberty pending appeal. Sacco is presently serving one of several consecutive sentences previously imposed on him.*

Statement of Facts

A. The Government's Case

During the course of its case, the Government proved that Frank Sacco and Benjamin Gentile had engaged in lending money to James Robbins under the threat of violence and that the same types of threats were used by Sacco, Gentile and John Rhines in their attempts to collect on these usurious loans to Robbins.

James "Sonny" Robbins initially borrowed $500 at an interest rate of $25 per week from Sacco on March

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in the District of Maryland and the Middle District of Florida where Sacco had also been convicted on 1971 indictments charging extortion. The testimony from the Middle District of Florida taint hearing, which was held during April 7 to June 12, 1975, and from the District of Maryland taint hearing, which was held during November 6 to November 16, 1972, were incorporated into the hearing record in the Southern District of New York. The New York hearing was held on March 30, 1976.

The proceedings were further delayed because Sacco was a fugitive from June 16, 1975 to February 28, 1976.

The delay in scheduling the instant appeal is primarily due to the fact that Sacco has successfully prevailed in having this Court relieve his court-appointed counsel who, after reviewing the entire record below, including the taint hearings in New York, Maryland and Florida, could find no meritorious appellate issues and accordingly filed an *Anders* brief. Sacco is now proceeding *pro se*.

* *United States* v. *Sacco*, M.D. Fla., 71-53 ORL Cr. —13 years; *United States* v. *Sacco*, M.D. Fla., 73-79 ORL Cr.—3 years; *United States* v. *Sacco*, D. Md., 71-0371-K—20 years. Sacco also has an outstanding eight year state sentence. *People* v. *Sacco*, Westchester County Ct., N.Y., 649/70.

19, 1970 when Sacco asked him if he needed money. (Tr. 126-29).* This initial loan of $500 was received in the form of a check made payable to Tony Iodice by Kathryn Fabian and endorsed by Iodice. (Tr. 131-33; GX 2).** Robbins dutifully began making his interest payments at a place known as Dooley's Tavern.*** Subsequent weekly payments were normally collected by Gentile at Robbins' business. (Tr. 135, 137, 140). Barbara Robbins confirmed that her husband made interest payments to Gentile on several occasions. (Tr. 508-09).

In May or June 1970, Gentile visited Robbins' auto wrecking business, driving a 1969 or 1970 Ford station-wagon which appeared to Robbins to have bullet holes in it.**** Robbins had previously seen Sacco driving the same car. (Tr. 141-43). Gentile stated that Sacco wanted Robbins to dispose of the car. Robbins refused. At the same time, Robbins stated that he needed another thousand dollars and Gentile said he would talk to Sacco about it. (Tr. 147-48). Three or four days later, Gen-

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* "Tr." refers to the trial transcript; "GX" refers to the Government Exhibit; "Br." refers to appellants' brief.

** Iodice and Fabian confirmed the utilization of this check as a loan to Robbins and refuted Sacco's statement at the time of the loan that the money was simply a payment to Robbins for cleaning services performed by him. (Tr. 374-75, 391-93). Iodice also verified that the loan was at an interest rate of $25 per week and that Robbins subsequently borrowed another $1,000 from Sacco. (Tr. 408, 410).

*** Surveillance testimony by Louis Estler of the New York State Liquor Authority and John Goetz of the Bureau of Alcohol, Tobacco and Firearms in April of 1970 established that Gentile and Sacco had an interest in Dooley's Tavern. (Tr. 346, 350, 360). Kathryn Fabian, the owner of Dooley's, also confirmed Sacco's and Gentile's financial investment in the bar. (Tr. 370-72).

**** Testimony from several witnesses corroborated Robbins' testimony that Gentile and Sacco had brought a bulletridden automobile to Robbins' junkyard in approximately May, 1970. (Tr. 430-37, 441-44, 465-68).

tile and Sacco returned to Robbins' junk yard in the same car. Sacco told Robbins "We got to get rid of this car." (Tr. 149). On this occasion, Sacco also asked Robbins if he had told Anthony Iodice that there was a "contract" out on him. Robbins said that he had because Iodice was his friend. The conversation then turned to the requested disposal of the car. Robbins was handed $1,000, but stated that he no longer needed the money. Finally, after initially refusing the money, Robbins took it. Gentile and Sacco then left the car with Robbins who disposed of it. After accepting the $1,000, Robbins was told his payments would now be $75 per week.* (Tr. 168-72).

Robbins began making the $75 payments regularly to Gentile at Robbins' garage. On one occasion Robbins indicated to Gentile that he did not have the required payment whereupon Gentile advised him that he had to have something because if he did not take some money back "the boss might think that he's keeping it." (Tr. 173-74). Robbins told Gentile that he was trying hard to get the money and that he did not want anything to happen to his family. Gentile replied, "Well, you don't have to worry about that. We'll tell you in advance if something like that is going to happen." (Tr. 173-74). Robbins made his last $75 payment directly to Gentile in August or September, 1970. He made one subsequent payment by dropping it off at a restaurant in Yonkers. (Tr. 177). Gentile had once mentioned to Robbins that "some other boys were supposed to come up" because Robbins was behind in some payments but that Gentile had asked them to "give him [Gentile] one more chance" to come up and see what Robbins' problem was. (Tr. 178).

Robbins had no further contact with Sacco and Gentile until December 6, 1971 when, as a result of phone call

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* The Government offered proof that the loans made to Robbins carried a total annual interest rate of 260 percent. (Tr. 757).

to his wife, he went to Benny's Charcoal Pit. Gentile had called Mrs. Robbins and told her that her "husband had an obligation to meet and that it would have to be taken care of" and that the total amount owed was now $9,000. (Tr. 512). On December 6, 1971, Robbins met Sacco and John Rhines.* Sacco asked what Robbins was going to do about the money which he still owed, which Sacco estimated to be $9,000. Robbins told Sacco he didn't have that kind of money but that he would do the best he could. Sacco said that "we will settle for $4500" and indicated that Rhines would be around to collect on some occasions. (Tr. 182-85). Rhines then departed. Sacco and Robbins continued their discussion. Robbins offered Sacco $1,500 as a settlement of his outstanding debt. Sacco rejected this but said that he would take $2,500 and instructed Robbins to have $1,500 by the next Friday. Sacco eventually agreed to give Robbins to the first of the year for the payment of the $1,500 and, at that time, they would discuss payment of the other $1,000. Sacco also directed that until Robbins paid the $1,500 he would have to pay $125 per week. (Tr. 186-87). Robbins remarked that he did not want anything to happen to his wife or children, to which Sacco replied that "as long as you keep your payments up you haven't got anything to worry about." (Tr. 215). At this point, Rhines rejoined Sacco and Robbins. Sacco told Robbins that he was going to have a contract drawn up to say that he and Robbins were partners. (Tr. 188). Within a few days after December 6th, Robbins received a phone call from Gentile asking if he had the $1,500. Robbins said that he did not. (Tr. 190).

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* Several FBI agents testified as to their surveillances and the conversations overheard at the meeting at Benny's Charcoal Pit on December 6, 1971. (Tr. 539-41, 543, 559, 616-21, 644-45, 677-80). Similar surveillance testimony was admitted as to the December 10, 1971 and January 7, 1972 meetings between Rhines and Robbins at Benny's Charcoal Pit. (Tr. 650, 656, 681-82, 751-52).

On December 10, 1971, Rhines met Robbins at Benny's Charcoal Pit and asked Robbins if he had any money. Robbins said that he had $125. Rhines told Robbins to give it to him outside. (Tr. 192). Rhines stated that he was supposed to have brought the contract but that it was not ready. Rhines was then called to the phone and returned to tell Robbins that Sacco wanted to talk to him. Sacco told Robbins that the partnership papers weren't quite ready and inquired as to how Robbins was doing with raising the money. Robbins told Sacco that he did not want anything to happen. Sacco replied that as long as Robbins kept up the payments on time that he would have nothing to worry about. (Tr. 94). Robbins told Sacco that he had the $125 he had promised. (Tr. 195). After concluding his conversation with Sacco, Robbins continued his conversation with Rhines, who at one point remarked that Gentile is "rough when he wants to be." (Tr. 195). Robbins gave Rhines the $125 after they left Benny's Charcoal Pit. (Tr. 196).

. In early January, 1972, Rhines visited Robbins at his junkyard and asked if Robbins had any money. Robbins owed $300 at that point, having missed his payment the previous week. Robbins asked Rhines if he had spoken to Sacco about whether Sacco would accept $1,500 as complete satisfaction for the outstanding debt. Rhines said he was thinking about it. Rhines said he had to have some money and told Robbins "that they were going to send somebody else up", some "rough boys", but that he had convinced them to "let me go up and talk to Sonny one more time." Rhines said that he would meet Robbins at Benny's Charcoal Pit on the following Wednesday. (Tr. 200-01, 203). Robbins told Rhines that he did not want any trouble and did not want anything to happen to either himself or his wife and children. Rhines replied, "Well, you just have to make your payment and you won't have no trouble." (Tr. 202). Robbins delivered $200 to Rhines on the following Wednesday as ordered. (Tr. 203-06).

Sometime later in January, 1972, Gentile visited Robbins at his place of business and asked Robbins if he had any money for him. Robbins stated he had nothing and indicated that he was upset over receiving so many different phone calls and instructions as to where to take his payments. (Tr. 213). Thereafter, Gentile called Robbins and in a coded manner advised him that he would pick up the money and that Robbins should not drop it off in White Plains. (Tr. 214).

In response to questions during direct examination concerning his state of mind, Robbins stated that he felt that at the time he received the second loan of $1,000 from Sacco and Gentile "something would happen to my wife and my family or myself" if he failed to make repayment. (Tr. 217-18). In response to a question concerning Sacco's reputation, Robbins testified that he "had heard that he [Sacco] wasn't the best person to be doing business with." (Tr. 218). He stated that as of December, 1971, when he discussed the outstanding debt with Sacco in Rhines' presence, he felt that physical harm would come to himself or to his family if he failed to give money to Sacco or Rhines. (Tr. 220). As of December 6, 1971, Robbins understood Sacco's reputation to be that of a "dangerous" man. (Tr. 221). As of December 10, 1971, Robbins expressed fear that he would be beaten up if he did not repay the money requested of him. (Tr. 222). Robbins also testified that as of the meeting in early January, 1972 when he paid $200 to Rhines, he felt harm would come to his family if he had failed to make that payment. (Tr. 223).

Sacco's grand jury testimony was admitted into evidence. During his grand jury appearance, Sacco denied lending money to Robbins, claiming that he had merely made a business investment into Robbins' junkyard business. (Tr. 782-83). Sacco acknowledged that ultimately Robbins came to borrow a total of $1,500 on which he had to pay $75 a week. However, Sacco claimed, this

was not interest; it was Sacco's share of the profits from the junkyard. (Tr. 890-91). Sacco denied ever telling Robbins that he owed between $4500 and $5000. (Tr. 798).

B. The Defense Case

1. Frank Sacco

In his defense, Sacco, who conducted the trial *pro se*, unsuccessfully attempted to elicit from FBI Agent William Walsh that inducements were made to force Robbins to file a complaint and that the indictment in this case was the result of a personal vendetta by Walsh against Sacco. (Tr. 843-48, 851-52).

Sacco also called several witnesses in an attempt to convince the jury that he was merely a partner in Robbins' junkyard and not a loanshark. (Tr. 940-45, 959-61, 986-87, 1008-11, 1049-54, 1244-49). From many of these witnesses Sacco attempted to elicit that Robbins had never expressed any fear of him, that Sacco had other borrowers who were not in fear of him, and that Robbins was being pressured by the FBI to fabricate evidence against Sacco.

2. John Rhines

In accord with Sacco's defense, John Rhines attempted to establish that the discussions between Sacco and Robbins related to a business partnership and not to usurious loans. To this effect, Rhines testified that he had several conversations with Robbins regarding the written business agreement that Robbins and Sacco had allegedly agreed to enter into. (Tr. 1106-07, 1113, 1120-22, 1123-25). Furthermore, while acknowledging that he had collected money from Robbins on behalf of Sacco, Rhines disavowed the use of either express or implicit threats in the course of these collections. (Tr. 1207).

3. Benjamin Gentile

The defendant Gentile offered no witnesses in his defense.

ARGUMENT

POINT I

Judge Gagliardi Did Not Abuse His Discretion In Denying Gentile A Severance.

Gentile argues that the trial judge should have severed his case from that of Sacco's in view of Sacco's comments to the jury, his examination and cross-examination of several witnesses and the admission of evidence of Sacco's generally bad reputation. All of these contentions are without merit.

This Court has repeatedly expressed a general preference in favor of trying together those defendants who are jointly indicted, where the crime charged in the indictment is provable against all such defendants by the same or a similar series of acts. Eg., *United States* v. *Kahaner*, 203 F. Supp. 78, 80-81 (S.D.N.Y. 1962) (Weinfeld, J.), *aff'd*, 317 F.2d 459 (2d Cir.), *cert. denied*, 375 U.S. 836 (1963). It is well settled that a motion to sever is addressed to the sound discretion of the trial court, *Opper* v. *United States*, 348 U.S. 84, 95 (1954); *United States* v. *Taylor*, Dkt. No. 76-1210, slip op. 2805, 2833 (2d Cir., April 13, 1977); *United States* v. *Rosenwasser*, 550 F.2d 806, 808-09 (2d Cir. 1977); *United States* v. *Ricco*, 549 F.2d 264, 273 (2d Cir. 1977); *United States* v. *Finkelstein*, 526 F.2d 517, 523 (2d Cir. 1975), *cert. denied*, 425 U.S. 960 (1976), and will not be disturbed on appeal except in cases of clear abuse, *United States* v. *Taylor*, *supra*, slip op. 2833; *United States* v. *Jenkins*, 496 F.2d 57, 68 (2d Cir. 1974), *cert. denied*, 420 U.S. 925 (1975). On appeal, the defendant bears the burden of showing that

substantial prejudice resulted because of the joinder and that the prejudice could have been avoided by separate trials. *United States* v. *Corr*, 543 F.2d 1042, 1052 (2d Cir. 1976). Here, Judge Gagliardi cannot be found to have abused his discretion in finding that the defendant had failed to bear his burden of demonstrating that he would be prejudiced by a joint trial with Sacco.

Gentile claims that Sacco made several statements while representing himself which substantially prejudiced Gentile in the eyes of the jury. He begins by claiming prejudice in Sacco's opening wherein he told the jury that:

> Mr. Gentile will testify in this trial that he acted on my instructions to collect monies from Mr. Robbins which were due to me as per the understanding we had. He will testify further that he never threatened Mr. Robbins in any manner. (Tr. 107).

Nowhere in Gentile's brief does he point out to this Court that Sacco stated that Gentile would testify because Gentile himself had so indicated to Sacco on the day prior to trial. Gentile thereafter changed his mind about testifying but did not advise Sacco before his opening. (Tr. 162-63). Sacco therefore had every right to comment on anticipated testimony from a presumably favorable witness such as Gentile. Furthermore, Gentile's rights were protected since the court gave instructions to the jury in its charge with respect to the right of a defendant not to testify. (Gr. 1455).*

Gentile also complains about Sacco's personal remark in his summation that "Benny spoke to me." (Tr. 1346). However, that comment should be considered in proper

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* While Gentile's counsel moved for a mistrial at the conclusion of Sacco's opening based upon his representation that Gentile would testify, he made no request for any immediate curative instruction. (Tr. 117-18, 162-63).

perspective. The context of the comment was as follows:

> Let us talk about this second loan. If you can recall, Mr. Robbins testified that he had told Mr. Gentile, "I need a thousand dollars. Can you ask Frank for it?"
>
> Then he says, "Yes, I'll talk to the boss."
> I objected to "the boss."
> So Benny spoke to me.
>
> He also testified that I went up there at a later date, a week later, and I was with Mr. Gentile and I says to him, "Here's a thousand," and he says, "No, I don't want it. I don't want to take it." (Tr. 1346).

The fact that Benny (Gentile) spoke to Sacco about an additional loan of $1,000 for Robbins is beyond dispute. Indeed, the Government's evidence showed that, within three or four days of Robbins' request that Gentile speak to Sacco about the additional money Sacco and Gentile showed up at Robbins' junkyard and delivered $1,000 to Robbins. (Tr. 148, 168-69). While Sacco may have strayed slightly from recounting Robbins' testimony, it certainly cannot be claimed that he either offered fresh evidence for the jury to consider or lent credence to the Government's case against Gentile by personally commenting on an isolated event that was disputed by Gentile.

Gentile also suggests that a severance should have been granted because evidence was admitted about the reputation and character of Sacco. He specifically claims that he was prejudiced by the evidence concerning Sacco's bullet-ridden vehicle (Tr. 142); his intention to eliminate one Ruggiero (Tr. 176); the "contract" on Iodice (Tr. 168-69); Sacco's reputation as dangerous and "violent" (Tr. 218-19); and Robbins' concern that he did not want anything to happen to his family if he failed

to meet his obligation (Tr. 218-22). However, Gentile overlooks the fact that similar evidence was equally applicable to him. He was seen in the same bullet-ridden car as Sacco on two occasions and was characterized by Rhines as "rough when he wants to be." (Tr. 147-48, 169-70, 195). Kathryn Fabian, the owner of Dooley's, testified that Gentile acted as a "body guard" to see that there was no trouble at Dooley's and to protect Sacco's investment. (Tr. 372).

Moreover, the provisions of the federal extortion statute under which Gentile and Sacco were convicted permit introduction of evidence of "prior conduct, character and reputation . . . to demonstrate the state of the victim's mind and to prove the use of implicit threats." *United States* v. *Curcio*, 310 F. Supp. 351, 357 (D. Conn. 1970). See also, *United States* v. *Natale*, 526 F.2d 1160, 1168 (2d Cir. 1975), *cert. denied*, 425 U.S. 950 (1976); *United States* v. *Bowdach*, 501 F.2d 220, 226-27 (5th Cir. 1974), *cert. denied*, 420 U.S. 948 (1975); *United States* v. *DeLutro*, 435 F.2d 255 (2d Cir. 1970), *cert. denied*, 402 U.S. 983 (1971); *United States* v. *Tropiano*, 418 F.2d 1069, 1081 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970). For such purposes, this evidence would have been admissible against the co-conspirator Gentile even if he were tried separately from Sacco.

Gentile also complains of the effect of Sacco's examination and cross-examination of various witnesses. He remarks that Sacco asked Robbins about his association with "ten or so apparently shady characters." (Gentile Br. 12, citing a list of individuals at Tr. 225-31). Not only is there nothing in the trial record to support the observation that these individuals were "shady," but it should also be noted that Sacco's list included FBI Agent Walsh, an attorney named Joel Arno (a partner of Government witness Leon Greenspan), Vincent Lanna (trial attorney for Rhines), Westchester Assistant District At-

torneys William McKenna and Louis Cherico, as well as Gentile himself. (Tr. 225-31). At most this line of questioning was pointless and inept cross-examination by a *pro se* defendant of a kind which this Court has held to be insufficient grounds for severance and mistrial in the absence of prejudice. *United States* v. *Calabro*, 467 F.2d 973, 987 (2d Cir. 1972), *cert. denied*, 410 U.S. 926 (1973).

Gentile also expresses displeasure with the testimony which Sacco elicited from Mrs. Robbins and Iodice regarding the payments of interest. Yet, in his summation Gentile's attorney conceded that Robbins was making interest payments of $25 per week but argued that without extortionate attempts to collect the loans this case was only one of usury with which the defendants were not charged. (Tr. 1372-74). Any testimony elicited from Mrs. Robbins and Iodice regarding $25 per week payments was no more than cumulative evidence of an undisputed fact.*

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* Likewise, the elicitation by Sacco of FBI Agent Hayes' comment that it was his job to "investigate possible violations against the United States" was little more than a statement of the obvious and one which was hardly prejudicial. (Tr. 624). FBI Agent Reutter's statement in his cross-examination by Sacco that he went to Benny's Charcoal Pit to surveil and "protect" Robbins on December 6, 1971 is similarly of little consequence to Gentile since only Sacco and Rhines attended that meeting. (Tr. 688-89). Gentile also registered no objection at either of these points in the agents' testimony and is therefore precluded from claiming error in this Court. Fed. R. Evid. 103(a). Similarly, Sacco's summoning of Frank Squires as a witness and Squires' attempted assertion of his Fifth Amendment engendered no prejudice to Gentile. Squires was not even able to get out more than "I am invoking the Fifth", before the Court sustained the objection to the question. (Tr. 1013). In any event, the question which elicited Squires' invocation of the Fifth related to whether Squires had ever lent money to Robbins. Of course, this had nothing to do with Gentile and he is unable to specify how this incident caused him any prejudice. *See, United States* v. *Variano*, 550 F.2d 1330, 1334-35 (2d Cir. 1977).

It is hardly uncommon for defense attorneys in multiple defendant cases to disagree with respect to strategies concerning cross-examination and presentation of evidence. *See, e.g., United States* v. *De Sapio*, 435 F.2d 272, 280-81 (2d Cir. 1970), *cert. denied*, 402 U.S. 999 (1971). And while Sacco certainly did not possess the legal acumen of his co-counsel, there is virtually no evidence that Sacco's defense strategy either consciously or unconsciously involved an attempt to undermine the positions of his co-defendants in the eyes of the jury. Indeed, Sacco argued at one point in his summation that Rhines and Gentile were indicted only because of their association with him. (Tr. 3151).

Gentile cites three cases in an attempt to support his argument that severance was warranted under the circumstances of his trial: *DeLuna* v. *United States*, 308 F.2d 140 (5th Cir. 1962); *United States* v. *Johnson*, 478 F.2d 1129 (5th Cir. 1973); *United States* v. *Barrera*, 486 F.2d 333 (2d Cir. 1973), *cert. denied*, 416 U.S. 940 (1974). A careful reading of *DeLuna* and *Johnson* reveals their distinction from the case at bar. And, an examination of *Barrera* only buttresses the Government's position that Gentile was not entitled to a severance.

DeLuna, supra, involved an improper attempt by a defendant who testified on his own behalf to comment on, and presumably take advantage of, his co-defendant's failure to testify. In *Johnson, supra*, one defendant sought to place full criminal responsibility with his co-defendant. Both *DeLuna* and *Johnson* are therefore cases where antagonistic or inconsistent defenses were raised by co-defendants. In the case of Gentile and Sacco, no such antagonism in defenses occurred. Sacco never attempted to implicate Gentile. On the contrary, the record demonstrates Sacco's protestations of collective innocence. (Tr. 1344, 1347, 1351).

In *Barrera, supra*, this Court affirmed a conviction of defendants who had been implicated in the conspiracy

with which they were charged in the course of hypothetical questions posed to an expert witness by counsel for a co-defendant. The same counsel in his summation conceded his client's conspiratorial participation. In the case of Gentile, Sacco never implicated him in the course of any of his examination or cross-examination of witnesses, and did the exact opposite of what occurred in *Barrera* by disclaiming the existence of any conspiracy. (Tr. 1344, 1348). *See also, United States* v. *DiGiovanni*, 544 F.2d 642, 644-45 (2d Cir. 1976).

In sum, Gentile has failed to show the type of prejudice or inconsistent defenses necessary to support his contention that the trial judge abused his discretion in denying a severance.*

POINT II

Judge Gagliardi Properly Denied Gentile's Motion To Suppress.

Gentile contends that the surveillance testimony of two Government witnesses, ATF Agent John Goetz and SLA Investigator Louis Estler, was tainted since the origin of the investigations which led to their observations at Dooley's Tavern in early 1970 was found in the illegal New York State wiretaps. Such an argument clearly fails for both legal and factual reasons, as stated in Judge Gagliardi's Memorandum decision of July 21, 1976 which ultimately denied Gentile's taint motion.

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* Gentile's arguments focus on the problems created by Sacco's *pro se* defense. However, with the Supreme Court's holding in *Faretta* v. *California*, 422 U.S. 806 (1976) that a defendant has a constitutional right to represent himself, there can be no reasonable suggestion that because a defendant exercises that right a severance must be granted to his co-defendants. To grant a defendant his severance motion based on the *pro se* character of his co-defendant's defense leaves control of the manner in which the trial is to be conducted in the hands of the defendants themselves.

At trial Louis Estler testified that he was employed by the State Liquor Authority and he observed Gentile in Dooley's Tavern on April 24, 1970. Estler overheard Gentile discussing the fact that some patrons were complaining about having to pay a cover charge to get in, and Gentile was overheard to direct that all customers had to pay. (Tr. 346). John Goetz testified that he was an agent of the Bureau of Alcohol, Tobacco and Firearms and that he was conducting an investigation of Dooley's Tavern in the spring of 1970. (Tr. 348-49). Goetz observed Gentile on April 16, 1970 and overheard him claim that "we have a piece" of Dooley's Tavern. (Tr. 350, 360).

Goetz was called by Sacco at the Florida taint hearing but Gentile decided not to call either Goetz or Estler at his hearing in New York on March 30, 1976.*

Gentile's basic contention at the taint hearing before Judge Gagliardi was that the Westchester District Attorney's office provided illegal state wiretap information to the State Liquor Authority (SLA) which, in turn, related

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*Gentile did contemplate calling Estler at the New York hearing but he was never called despite Judge Gagliardi's request that Gentile's attorney first interview Estler to determine if his testimony was necessary. (N.Y. 74). The court gave Gentile one week from March 30, 1976 to interview other potential witnesses including Estler. (N.Y. 80). Gentile's attorney said that he would do so and represented that no further witnesses would be called if their interview indicated their testimony would be "cumulative or add[ed] nothing". (N.Y. 79-80). Gentile subsequently did not request the opportunity to offer testimony from Estler or any other witness. ("N.Y." refers to the New York taint hearing on March 30, 1976).

For the purpose of the New York hearing, the Government and Gentile stipulated to the 4500 pages of testimony given at the Maryland and Florida hearings. The portions of this testimony relevant to the Robbins' loans from Sacco was summarized in the Government's memorandum of March 18, 1976. All the hearings were conducted on the *arguendo* basis that the state wiretaps were illegal.

that same wiretap information to the Bureau of Alcohol, Tobacco and Firearms of the Treasury Department (ATF) which caused ATF to send its agent (Goetz) to surveil Dooley's Tavern in an undercover capacity. (The surveillance activity of ATF was in no way linked to the subsequent FBI investigation of the Sacco loan to Robbins.) Gentile's argument concluded with the claim that Goetz' trial testimony concerning his surveillance was therefore tainted because it was the product of an investigation prompted by illegal wiretap evidence. As to Estler, such an argument was not so clearly articulated at the taint hearing before Judge Gagliardi. Nonetheless, essentially the same contention was implicitly pressed by Gentile except that the chain connecting the presumed illegal evidence and the tainted testimony is abbreviated since Estler was an employee of the State Liquor Authority which directed him to perform surveillance activity on behalf of that state agency. (N. Y. 4-11).*

While the Government has the ultimate burden of persuasion to demonstrate that the evidence in the prosecution of Gentile was not tainted by the illegal state wiretaps, the appellant Gentile "has the initial burden of producing specific evidence demonstrating taint in a *substantial* portion of the Government's case against

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* Gentile has focused his attack on the taint issue not at the heart of the Government's case, i.e., the testimony of the victim Robbins, but at the testimony of two insubstantial witnesses, Goetz and Estler. His decision to abandon any claim of taint as to Robbins' testimony is probably the result of the fact that FBI Agent Walsh testified repeatedly that the information regarding the Robbins' loans from Sacco came directly from Robbins and an FBI informant, and not from any state wiretap evidence. (N.Y. 20, 56). (Fla 317-22, 370-74, 497-500). (Md. 1366-67) ("Md." refers to the Maryland taint hearing. "Fla." refers to the Florida taint hearing). See also the affidavits of Westchester County Assistant District Attorneys William McKenna and Louis Cherico, N.Y. 82-85.

him. . . . Until appellant [has] met that burden, the Government [is] not required to show the independent origin of its proof." (emphasis added). *United States* v. *Sapere*, 531 F.2d 68, 66 (2d Cir. 1976). See also *Alderman* v. *United States*, 394 U.S. 165, 183 (1969) and *Nardone* v. *United States*, 308 U.S. 338, 342 (1939).

To show that Goetz' testimony was tainted, Gentile had to establish that whatever wiretap information concerning Dooley's Tavern received by the SLA from the Westchester District Attorney's Office was passed on to ATF. Judge Gagliardi conducted an *in camera* inspection of the SLA documents in the ATF file and found that no such wiretap information was contained therein. (N.Y. 43). Furthermore, Goetz' testimony in the Florida taint hearing, which by stipulation was made part of the New York record, demonstrates that the surveillance activity of Goetz was not prompted by the illegal wiretap evidence. Goetz testified that the impetus for an investigation of Dooley's Tavern had come from the New York Organized Crime Strike Force. (Fla. 1901-22). He also testified that he was not aware of the existence of the 1970 New York wiretaps in question until just before his testimony in the 1975 Florida taint hearing. (Fla. 1905). Goetz revealed that the ATF file on the investigation contained some documents from the State Liquor Authority. The SLA documents were turned over to court in the Florida hearing for its *in camera* inspection, but the court found nothing significant upon its review. (Fla. 1916). Goetz further testified that the SLA documents were not even received by ATF until much after ATF began its investigation in April, 1970, and that ATF had no information from the State Liquor Authority concerning Frank Sacco prior to its investigation. (Fla. 1922-23).

Similarly, Gentile offered no proof that Estler's surveillance of Dooley's was a product of information derived from the state wiretaps. Indeed, Gentile offered no docu-

ments from the SLA file which he subpoenaed for the New York taint hearing which supported his argument. Similarly, a negative inference must be drawn from his decision not to call Estler as a witness at the New York hearing since his attorney indicated, with the court's concurrence, that he would first interview Estler and then indicate to Judge Gagliardi whether Estler's testimony would be necessary since he did not wish to call him as a witness if his testimony would be "cumulative or add[ed] nothing." (N.Y. 80).

Additionally, it should be noted that had Gentile successfully shouldered his burden and produced specific evidence demonstrating that Goetz' and Estler's testimony was tainted, he still could not prevail under *Alderman* even if the Government could not prove independent origins for their testimony. *Alderman* requires a demonstration by Gentile of a taint in a "substantial" portion of the Government's case against him. Goetz and Estler's testimony can hardly be characterized as "substantial". Their surveillance observations are in no way corroborative of the Robbins' loans from Sacco, or any type of relationship between Robbins and Sacco, Gentile or Rhines. Furthermore, the Government's sole purpose in offering the Goetz and Estler testimony was to link Gentile with the operation of Dooley's Tavern, a fact that was conceded by Gentile's attorney at trial and independently corroborated by the trial testmiony of the owner of Dooley's Tavern. (Tr. 356, 372). Any claim that Goetz and Estler were significant or critical witnesses for the Government is therefore certainly defied by the record below.*

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* In his summation the prosecutor did not even comment on the essence of Goetz' or Estler's testimony. (Tr. 1429). Not unexpectedly, Sacco noted in his summation that the surveillance testimony of Estler and Goetz had "no relevance whatsoever concerning this case." (Tr. 1334). And Gentile's attorney in his summation noted that the only important witness to the Government's case was Robbins. (Tr. 1369).

POINT III

The District Court Properly Denied Sacco's Suppression Motion.

Sacco makes several arguments surrounding his claim that he was improperly denied a full and complete taint hearing with respect to the New York State wiretaps in question. Sacco urges that the trial judge erred by denying his taint motion while Sacco was a fugitive, by failing to actually resolve his tape tampering motion, by refusing to dismiss the indictment because some of the New York State wiretaps were not sealed, by ignoring evidence of taint and by failing to grant him a pretrial taint hearing. Each of these arguments is equally without merit.

A. Sacco's fugitive status was sufficient grounds for denial of his taint motion.

Sacco argues that despite his fugitive status, once he was returned to the custody of federal authorities, the court should have granted him leave to resume his pursuit of the type of relief sought in his previously filed taint motion.* This argument is without merit and it is clear that Judge Gagliardi properly exercised his discretion not only to deny Sacco's motion when he became a fugitive but also to deny him a reinstatement of that motion after his capture.

Escape has long been recognized as a proper ground for dismissal of appellate matters. In *Estelle* v. *Dorrough*, 420 U.S. 534 (1975), the Supreme Court upheld

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* All of Sacco's taint motions were denied on February 9, 1976 when Sacco failed to appear for the scheduled hearing. His motion for reinstatement of these motions was denied in a memorandum decision on June 3, 1976.

the constitutionality of a Texas statute which provided for the automatic dismissal of an appeal if a defendant escaped pending the appeal.* In rendering its decision in *Estelle* v. *Dorrough*, *supra*, at 537, the Court noted:

> Disposition by dismissal of pending appeals of escaped prisoners is a longstanding and established principle of American law. . . . This Court itself has long followed the practice of declining to review the convictions of escaped criminal defendants. . . . Thus in *Molinaro* v. *New Jersey*, 396 U.S. 365 (1970), we dismissed the appeal of an escaped criminal defendant, stating that no persuasive reason exists to adjudicate the merits of such a case and that an escape "disentitles the defendant to call upon the resources of the Court for determination of his claims." *Id.*, at 366.

See also, *United States* v. *Gordon*, 538 F.2d 914, (1st Cir. 1976); *United States* v. *Shelton*, 508 F.2d 797, 799 (5th Cir.), *cert. denied*, 423 U.S. 828 (1975); *United States* v. *Sperling*, 506 F.2d 1323, 1345 n.33 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 (1975); *United States* v. *Shelton*, 482 F.2d 848 (5th Cir.), *cert. denied*, 414 U.S. 1075 (1973); *United States* v. *Swigart*, 490 F.2d 914 (10th Cir. 1973); *Brinlee* v. *United States*, 483 F.2d 925 (8th Cir.), *cert. denied*, 419 U.S. 878 (1973); *United States* v. *O'Neal*, 453 F.2d 344 (10th Cir. 1972).

The District Court did not exercise its discretion to deny Sacco's motion on the basis of this fugitivity with-

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* The taint motion of Sacco in Florida, *United States* v. *Sacco*, M.D. Fla., 71-53 ORL Cr., as well as his appeal, which was being held in abeyance pending the district court's decision on the motion, were dismissed because of his fugitivity. On November 18, 1976, the United States Court of Appeals for the Fifth Circuit refused to reinstate his appeal Sacco's taint motion was denied in Maryland, *United States* v. *Sacco*, D.Md., 71-0371-K, and his conviction is now pending appeal before the United States Court of Appeals for the Fourth Circuit.

out first attempting to protect Sacco's rights. Judge Gagliardi directed that notice of the New York taint hearing be sent to Sacco's Maryland attorney, with whom Sacco had communicated during his fugitivity. Notice was also sent to Sacco's court appointed attorney in New York. As things turned out, Sacco did, in fact, learn of the February 9, 1976 hearing date because he telephoned Gentile's attorney on at least two occasions prior to the hearing and specifically learned of the scheduled hearing date. (Tr. of February 9, 1976 at 3-4). Given such actual notice, it is clear that Sacco deliberately absented himself.* The District Court not only acted properly in denying the suppression motion on the basis of Sacco's absence, but in these circumstances could hardly do otherwise and still uphold the dignity of the court.

B. Despite the proper denial of his taint motion due to Sacco's fugitivity, the District Court made clear findings with respect to the claim of taint and the related issue of tampering.

Sacco further contends that the tape tampering and the missing tape issues were never resolved by Judge Gagliardi despite his memorandum opinion of July 28,

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* The ability of the District Court to find a waiver in the failure of a defendant to appear when so noticed is without question. *United States* v. *Tortora*, 464 F.2d 1202, 1208-10 (2d Cir.), *cert. denied sub. nom.*, *Santoro* v. *United States*, 409 U.S. 1063 1972). As in the case of the defendant in *Tortora*, Sacco having received notice of the scheduled taint hearing on February 9, 1976 "cannot now complain of his failure actively to participate therein." *United States* v. *Tortora*, *supra*, 464 F.2d at 1210. See also *United States* v. *Pastor*, Dkt. No. 76-1364, slip op. 3633, 3637 (2d Cir., May 19, 1977); *United States* v. *Schwartz*, 535 F.2d 160, 165 (2d Cir. 1976); *United States* v. *Peterson*, 524 F.2d 167, 182-186 (4th Cir.), *cert. denied*, 423 U.S. 1088 (1976); *Government of Virgin Islands* v. *Brown*, 507 F.2d 186 (1st Cir.).

1975.* Judge Gagliardi noted that he did not believe a meaningful independent determination on the tampering question could be made. As a general proposition, the court thought it inappropriate to attempt to resolve the taint issue and the tampering issue as separate matters. (Memorandum Opinion of 7/28/75, at 204). He stated:

> In making a determination on the ultimate issue of taint in the Sacco case, the questions concerning the circumstances surrounding the loss of the tapes and those relating to an independent, untainted source would seem to be inseparable. This is because the strength of the proof of an independent source must be weighed against the suspiciousness of the circumstances surrounding the tapes. (Memorandum of 7/28/75 at 3).

Judge Gagliardi did specifically note, however, that there was no direct evidence that the missing eight tapes were destroyed under suspicious circumstances. Furthermore, despite "irregularities" in certain tape-recordings, the court concluded that:

> [T]here had been no intentional destruction of or tampering with any of the tapes in question. The irregularities appearing on the tapes were apparently the result of mechanical malfunctions occurring at the time the tapes were originally recorded. (Memorandum of 7/28/75 at 4).

The reluctance of Judge Gagliardi to separate the taint issue is perhaps a result of this Court's opinion

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* Sacco first raised the claim that the tape recordings from the state wiretap had been tampered with in November, 1974 after listening to the tapes during the preceding ten months. Hearings during which expert testimony was received were held during the period January to March, 1975. The court eventually determined, based on thees hearings, that no intentional destruction or tampering of tape recordings occurred. (Memorandum decision of July 2[illegible] 1975).

in *United States* v. *Garcilaso de la Vega*, 489 F.2d 761 (2d Cir.), *cert. denied*, 417 U.S. 909 (1974) wherein the Government made a strong showing of an independent, untainted source in the face of a suppression motion prompted in part by the loss of tape recordings by state officials. While Judge Gagliardi may not have been presented with independent, untainted source evidence at the time of the tampering hearings on January 6, 1975 and February 19, 1975, that is not to say that he was not eventually availed of such. The hearing on March 30, 1976 as to Gentile's identical claim of taint, coupled with the significant testimony from the Florida and Maryland hearings, clearly provided the court with overwhelming proof that FBI Agent Walsh first learned of Sacco's loans to Robbins from a confidential informant and then from Robbins himself without ever learning anything concerning those loans from state wiretaps. Judge Gagliardi's adoption of the finding by the District Court of Maryland that no taint existed as to Sacco (Tr. 6/9/76, 12-13) and his denial of Gentile's identical taint motion by his decision of July 21, 1976 completely resolved the tampering *and* taint issues pending before the court.*

C. Dismissal of the indictment was not warranted because of the failure of the state authorities to seal tape recordings which were never utilized as evidence in the trial of Sacco.

Sacco also urges that a reversal of the District Court's denial of his taint motion is warranted by the failure of

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* The District Court's in Maryland specifically found as to Sacco:

> if I were proceeding on a basis where the government had the burden of proof beyond a reasonable doubt, I would find and do find beyond a reasonable doubt that there is no evidence that the Government utilized directly or indirectly the fruits of the wiretapping . . . (Tr. 5/28/76, at 2).

the state authorities to seal 37 of the 439 tapes involved in the state wiretaps. Sacco completely misreads the significance of this Court's opinion in *United States* v. *Gigante*, 538 F.2d 502 (2d Cir. 1976) which dealt with suppression of tape recordings which the Government sought to use as evidence. The Court's conclusion as to the proper remedy for faulty sealing of the *Gigante* tapes is hardly applicable to Sacco's case where the Government has neither attempted to use the state wiretap recordings as evidence nor claimed any direct or indirect leads from such as the basis of its prosecution of Sacco. See *United States* v. *Fury*, Dkt. No. 738, slip op. 3195, 3211 (2d Cir., April 27, 1977).

D. The record below establishes the absence of taint and the existence of an independent source.

Sacco also argues that it is "undisputed" that the Westchester County District Attorney's Office turned wiretap information over to the New York Joint Strike Force, the FBI, the Bureau of Alcohol, Tobacco and Firearms and the New York State Liquor Authority and that because of their close working relationship the knowledge of one should be imputed to the others. Nowhere in Sacco's brief does he support his claim that these agencies were acting in concert in an investigation of him. Furthermore, while the FBI may have learned from the Westchester County District Attorney that Sacco was about to depart the jurisdiction or that Sacco had something to do with a new bar opening in Peekskill (Md. 173), there is absolutely not a shred of evidence indicating that the FBI, or any other federal or state agency, acquired any information about this case from the Westchester District Attorney's Office.*

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* See the discussion in Point II on the issue of taint and independent source as raised by Gentile.

Neither Sacco nor Gentile has shown in any of the three taint hearings already conducted that any conversation concerning the loans to Robbins was ever intercepted or that the New York investigation or prosecution of Sacco and Gentile was based on any information resulting from the New York wiretaps. The result is a complete failure on the part of the appellants to carry their initial burden under *Alderman* v. *United States*, 394 U.S. 165, 174 (1969) of proving that a substantial portion of the case against them was the result of the illegal wiretapping in question.*

E. The District Court did not err in denying Sacco a pre-trial evidentiary hearing with respect to the New York State wiretaps.

Sacco argues that the trial judge improperly denied his motion for a pre-trial evidentiary hearing on his claim that the Government's case against him was tainted by the New York State wiretaps. Sacco contends this denial warrants reversal of his conviction. Such a conclusion is not supported by the applicable law or the facts of this case.

While it is clear that Sacco moved prior to trial for an evidentiary hearing on his allegation that the Gov-

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* Sacco's reliance on *United States* v. *Maggadino*, 496 F.2d 455 (2d Cir. 1974) on the claim of imputed knowledge is completely misplaced. In *Maggadino*, the Government utilized illegal federal and state wiretaps to develop the indictment under challenge, which was not the case as to the indictment of Sacco and Gentile. In *Maggadino*, the initial burden under *Alderman* had been met and dismissal of the indictment was appropriate when the Government refused to go forward and meet its burden of proving the untainted, independent source which it claimed to exist. In the case at bar, assuming *arguendo* that the appellants had met their initial burden, the Government has offered uncontroverted proof that the prosecution of Sacco and Gentile was founded on clearly independent and untainted sources.

ernment's case against him was tainted by New York State wiretaps, it is also clear that Sacco's requests for such a hearing did not state any reasonable grounds for his allegation that federal authorities had been furnished with information from the state authorities responsible for the wiretap. (Sacco pre-trial motions of 7/31/72 and 9/5/72.) Similarly, Sacco made no effort in his motion to contend what type of evidence could have possibly been obtained from the state wiretaps that would have assisted the federal prosecution of him.

The sparsity of factual support for Sacco's demands for an evidentiary hearing was obvious to the court when the Government responded to his motion with a denial that any leads from the Westchester wiretap led to the prosecution. Confronted with Sacco's bald assertion of taint from evidence gathered by non-federal sources, and relying on the Government's good faith representation that no leads from the wiretaps led to the federal prosecution (Tr. of 9/11/72, at 24-25), Judge Gagliardi properly denied Sacco's motion, leaving open the possibility that his motion would be reconsidered if a substantial claim of taint developed later. (Tr. 17). The court's ruling is entirely consistent with the Supreme Court's pronouncement in *Nardone* v. *United States*, 308 U.S. 338, 342 (1939):

> Like mischief would result were tenuous claims sufficient to justify the trial court's indulgence of inquiry into the legitimacy of evidence in the Government's possession. . . . Therefore claims that taint attaches to any portion of the Government's case must satisfy the Court with their solidity and not merely be a means of eliciting what is in the Government's possession.

See also, *United States* v. *Foddrell*, 523 F.2d 86 (2d Cir.), *cert. denied*, 423 U.S. 950 (1975); *United States* v. *McCall*, 489 F.2d 359, 363 (2d Cir.), *cert. denied*, 419 U.S. 849 (1973); *United States* v. *Tortorella*, 480 F.2d

764, 785 n.18 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973).

Sacco cites the dictum found in *United States* v. *Birrell*, 470 F.2d 113 (2d Cir. 1972) to support his demand for reversal of his conviction. However, while this Court announced its disapproval of postponing taint hearings until after trial, there is certainly nothing within the *Birrell* decision to dispense with the "solidity" requirement of *Nardone*. Furthermore, even assuming Sacco had justified an evidentiary hearing on the taint issue, this case is perhaps most illustrative of the propriety of the concerns of Judge Herlands and other federal judges who have in the past approved post-trial suppression hearings where the need for such was manifest prior to trial. *United States* v. *Birrell*, 269 F. Supp. 716 (S.D.N.Y. 1967). See also, *United States* v. *Sacco*, 428 F.2d 264, 273-74 (9th Cir.), *cert. denied*, 400 U.S. 903 (1970); *United States* v. *Nolan*, 420 F.2d 552 (5th Cir. 1969), *cert. denied*, 400 U.S. 819 (1970). Preparation for the hearing would have entailed at least several months to allow for the duplication and furnishing of some 439 tape-recordings containing 15,000 conversations, and an ample opportunity for Sacco and his co-defendants to listen to all these conversations. The hearing itself, if judged by what occurred in the Florida taint hearing, would have lasted twice as long as the actual two week trial before Judge Gagliardi and would have entailed the summoning of dozens of witnesses. All of this would have occurred despite the Government's denial that any part of its prosecution was based on the state wiretaps which were not even in its possession. Ironically, given the Government's lack of knowledge as to the contents of the state wiretaps, it is conceivable that the conduct of such hearings prior to trial would have created the first occasion during which the prosecution might learn of illegal evidence on its previously untainted prosecution.

In arguing that only a pre-trial hearing could suffice in these circumstances, Sacco does not articulate what interests of his were left unprotected by the use of the post-trial hearing procedure. Sacco himself was the source of the only damage caused to him during post-trial litigation of the taint issue. But for his conscious decision to absent himself from the scheduled proceedings Sacco would have had the full opportunity to litigate before Judge Gagliardi his allegations of taint.

POINT IV

There Was No Prosecutorial Misconduct.

Sacco raises numerous claims of prosecutorial misconduct which he argues should have been corrected by immediate cautionary instructions by the court and which should have served as the basis for the granting of his motion for a mistrial. Such contentions are absolutely baseless.

A. Claims of inaccurate statements and unsworn testimony.

Sacco argues that several of the prosecutor's comments during his summation were misstatements of the record and that such misstatements constituted unsworn testimony on the part of the prosecutor. A close review of the record, however, will reveal that the prosecutor was substantially rephrasing the testimony presented at trial.

Sacco contends that the prosecutor misstated the evidence when he stated:

> Mr. Broderick: Mr. Ruggiero then comes in and testifies, "Yeah, I did mention to him something about that." And what did Mr. Gentile say back? Don't worry about the thing, take the

> money from him *and we will take care of him.* (Tr. p. 1407). (emphasis added).

In response to defense counsel's objection the court immediately noted that the jury's recollection controls. (Tr. 1407). The prosecutor rephrased the point he was making by stating:

> Mr. Broderick: We will take care of the money, don't worry about that. (Tr. p. 1407)

In either form, the prosecutor was simply and properly rephrasing Robbins' testimony that he had told Gentile about the offer of Ruggiero to lend him $5,000 and Gentile's responses:

> A. So I had told Benny Gentile this, and he said, "Well, if you're able, borrow the money." He says, "Borrow as much as you can." And he says, "I will guarantee you will never have to pay it back." (Tr. 176).

Sacco also urges that the prosecutor made himself an unsworn witness when he commented in his summation on Mrs. Robbins' testimony:

> Mr. Broderick: She was involved. She knew about the money being loaned out, the $25 a week. She saw Gentile coming up. But now the defendant Gentile, he doesn't call up Sonny Robbins. He does not call Sonny Robbins up. Who does he call up? He calls up the man's wife and mentions the word, you know, he has an obligation to us. Of course, he did it in a nice manner, very nice. He has an obligation to us. He has an obligation. You know, he should pay it, don't you Mr. Robbins? How is your business? How is everything coming along? (Tr. 1408).

It is clear that the prosecutor was only paraphrasing and commenting on properly admitted testimony

of Mrs. Robbins. Mrs. Robbins testified that she had seen her husband give Gentile $25 on several occasions and that Gentile had called her and advised her that Robbins had an obligation of $9,000 that had to be met. Gentile also remarked to her about what a good business they had. (Tr. 509, 512).

Sacco attributes an erroneous statement to the prosecutor when he commented:

> Mr. Broderick: The defendant Sacco didn't forget. Did he forget with Kitty Fabian when he spoke to her two months ago, *You owe me $4,000.* (Tr. p. 1410). (emphasis added).

While the record does not reveal testimony from Fabian regarding the specific sum of $4,000, it is clear that Sacco did speak to her on the occasion referred to about paying back money owed to Sacco (Tr. 379), and that Sacco had invested $6,000 or $7,000 in Fabian's business. (Tr. 372).

Sacco further urges that the prosecutor engaged in serious misconduct when he made the following comments to the jury:

> Mr. Broderick: Did he speak to any of his other witnesses there? Anyone who enters into business with him, business in quotes, seemingly goes out of business, except the defendant Rhines. He does not go out of business, because he takes over the business of Mr. Palumbo after he meets the defendant Sacco. A little bit different here. (Tr. 1410).
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> * * * * *
>
> Then it comes to 12/10. Mr. Rhines testified, I received some phone calls from Mr. Sacco. Oh, I don't mind doing it, I don't mind going up there for Frank. I'll go pick up some money for him. *What the heck. you loaned Palumbo money once*

> and now I have the business. (Tr. p. 1417). (emphasis added).

While the record does not support the prosecutor's reference to Mr. Palumbo, a matter of little significance, Rhines' testimony does reveal that Sacco did ask him to pick up money from Robbins on December 10, 1970. (Tr. 1151). Not only did the court again repeat its admonition that it was the "jury's recollection that governs in this case" (Tr. 1418), but upon recognizing the error in the prosecutor's suggestion that Sacco had lent money to Palumbo, the court gave the jury a specific curative instruction. (Tr. 1449-50).

Sacco argues that the prosecutor improperly noted that surveillance pictures of Rhines and Robbins on December 10, 1971 reveal the passing of an envelope containing money for Sacco:

> Mr. Broderick: We don't want any witnesses. We are going to pay off a loan. Unfortunately, agents were there and they took the pictures of him going in the bank of the shopping center, around the corner, by a laundromat where no one could see him get the envelope for Frank Sacco. (Tr. p. 1419-20).

The Court properly noted however that the prosecutor was referring to the photographs (GX 6-22) of the events which preceded Robbins' delivery to Rhines of the envelope. (Tr. 1420). The trial record supports the contention that an envelope was passed to Rhines for Sacco during the FBI surveillance on December 10, 1971. (Tr. 196, 655-59).

Sacco's argument that immediate curative instructions were necessary for all of the above-noted claims of alleged prosecutorial conduct is therefore clearly not justified. Nonetheless, he misleads this Court by suggesting that the trial judge admonished the jury that it was their recollection which controlled after

only one of the claimed misstatements. However, other than the admonition and curative instruction after the acknowledged misstatement as to Mr. Palumbo (Tr. 1418, 1449-50), Judge Gagliardi made similar cautionary statements on two other occasions of claimed error during the prosecutor's summation. (Tr. 1407, 1415).

Furthermore, during the summations of Sacco and counsel for Gentile, and in his instructions to the jury, Judge Gagliardi reminded the jury that it was their recollection which controlled. (Tr. 1345, 1349, 1387, 1458-59). Thus, while the record evidences no substantial prejudicial comment on the part of the prosecutor, there are several instances of cautionary instructions which would have clearly protected Sacco even if improper comments were made. See *United States* v. *Pfingst*, 477 F.2d 177 (2d Cir.), *cert. denied*, 412 U.S. 941 (1973).

Sacco contends that, in addition to the foregoing alleged instances of misstatements, the prosecutor also attempted to become an unsworn witness when he stated:

> Mr. Broderick: Mr. Lanna mentioned in his summation that's not the way shylocks operate. I don't know how they operate, but I know here there were phone calls all the time. When I say "I know" I want you to refer to the evidence. (Tr. 1414).

The prosecutor's immediate statement that the term "I know" should only be construed in light of the evidence cured any inadvertent comment on his part. It is difficult to see how this corrected slip of the tongue, *see Orebo* v. *United States*, 293 F.2d 747, 749 (9th Cir. 1961), *cert. denied*, 368 U.S. 958 (1962), could have prejudiced Sacco.*

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* Sacco himself was guilty on several occasions during his own summation of attempting to give unsworn testimony for which he was admonished by the court. (Tr. 1342, 1349, 1353, 1358, 1359).

B. Comments by the prosecutor concerning the credibility of Robbins.

Sacco also complains of remarks in the prosecutor's summation regarding Robbins' truthfulness.*

He urges that error was committed by the prosecutor by simply addressing the issue of a witness' credibility. However, when, as in this case, credibility is a key issue and forms the basis of the defendant's summation, this Court has noted in *Lu[illegible] v. Follette*, 418 F.2d 1266, 1269 (2d Cir. 1969), *cert. denied*, 397 U.S. 1050 (1970) that when a prosecutor is "provoked by an attack on the credibility of a government witness, [he] 'may reply to the argument of opposing counsel, and in doing so may make statements which might otherwise be improper.'" See also, *United States* v. *Stassi*, 544 F.2d 579, 585 (2d Cir. 1976). In the instant case, Sacco in his summation specifically accused Robbins of being a "liar." (Tr. 1351-52, 1353, 1357).** In response to his attack on Robbins' testimony, the prosecutor attempted

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* He's got to tell the truth, because if he is not telling the truth they will know, "I'm lying," so he told the truth all the time, always told the truth. (Tr. p. 1419).

* * * * *

He had to be telling the truth. (Tr. p. 1425).

* * * * *

Ladies and gentlemen, Sonny Robbins testified here, testified truthfully, the best way he can. (Tr. p. 1430).

** Sacco makes a related argument that error was committed when the prosecutor commented on FBI Agent Amaditz' testimony:

> Then I submit to you he was telling the truth when he overheard the conversation between defendant Sacco and the defendant Sacco and the defendant Rhines and he said, "Let's see how much money he has." Amaditz was telling the truth when he heard that, that's right. (Tr. p. 1428a).

But just as Robbins' truthfulness was attacked by Sacco, so too was the credibility and motivations of the FBI. In his summation, Sacco questioned Amaditz' truthfulness and accused the FBI of pursuing him on a vendetta. (T[illegible]337, 1353).

to demonstrate that Robbins' trial testimony was consistent with oral statements he had provided to the FBI after tape-recorded sessions with the defendants. He argued that Robbins had to tell the truth since the tape-recordings would expose any inconsistency between his oral statement and the actual conversations. In light of the flat out assertions by Sacco that Robbins was lying under oath, it was not error for the prosecutor to comment on Robbins' credibility as he did. This was fair reply. See *Lawn* v. *United States*, 355 U.S. 339, 359-60 n. 15 (1958); *United States* v. *Greenbank*, 491 F.2d 184, 188 (9th Cir.), *cert. denied*, 417 U.S. 931 (1974); *United States* v. *Davis*, 487 F.2d 112, 125 (5th Cir. 1973), *cert. denied*, 415 U.S. 981 (1974); *United States* v. *Santana*, 485 F.2d 365, 370-71 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974).

C. Comments on Robbins' state of mind.

Sacco argues that the prosecutor erred in making the following comments on the state of the victim Robbins' mind:

> Then what happens? Mr. Sacco, he gets up and goes for a walk with Sonny Robbins. Sonny Robbins *is thinkng about bulletholes* right now in a car. (Tr. p. 1412).
>
> * * * * *
>
> Robbins is thinking of bulletholes and that Sacco is a violent person. (Tr. 1424).

However, each inference drawn by the foregoing comments as to the state of Robbins' mind is clearly based in fact. The record is replete with testimony that Robbins had seen Sacco in a bullet-ridden vehicle and had considered him a violent person. (Tr. 141-43, 149, 168-72, 221-23). State of mind testimony is also recognized as vital to this type of prosecution. *United States* v. *Natale*, *supra*, 526 F.2d at 1168-69 n. 10; *United States* v. *Tropiano*, *supra*, 418 F.2d at 1081. If Sacco's argu-

ments were to succeed and the Government precluded from such comment, prosecutors would be severely limited in arguing all legitimate inferences from the evidence. See *United States* v. *Gerry*, 515 F.2d 130, 144 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975); *United States* v. *Santana*, *supra*, 485 F.2d at 370; *United States* v. *LaSorsa*, 480 F.2d 522, 526 (2d Cir.), *cert. denied*, 414 U.S. 855 (1973); *Orebo* v. *United States*, *supra*, 293 F.2d at 749.

D. Miscellaneous claims of prosecutorial misconduct.

Sacco alleges that error resulted when the prosecutor argued to the jury that the Government had not disputed any of the facts surrounding the initial loan of $500 which was the subject of the dismissed first count in the indictment.* Any necessary correction of this statement was made when the court immediately noted in the jury's presence that the jury was well aware that Count One of the indictment, which alleged extortion in connection with that initial loan of $500, had been dismissed. (Tr. 1405). The jury was surely not entitled, as Sacco suggests, to a detailed reason why Count One had been dismissed.

In sum, it is apparent that Sacco raises no serious claims of prosecutorial misconduct and can demonstrate no prejudice resulting from any of the comments made by the prosecutor. He has friviously asserted prosecu-

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* The prosecutor stated:

He started telling us certain things. He started telling the agents of the F.B.I. He mentioned the first thing about how he obtained the loan, government's exhibit # 1 in evidence. He obtained $500.00. He was not afraid. It was only a two week loan, he got some rent, pay it, $25 a week, no problem. He was not worried about that. *We weren't questioning that. We never said anything about that.* (Tr. p. 1404-5) (emphasis supplied).

torial misrepresentations which in fact did not occur, and he has demonstrated a shallow understanding of the law by contending that the prosecution could not comment on Robbins' credibility or state of mind.

POINT V

The Trial Judge Did Not Commit Reversible Error When He Instructed The Jury On Jencks Act Material.

Sacco argues that the trial court improperly instructed the jury on the source of Jencks Act material as to the witness Robbins and such instruction constituted reversible error. Such an argument is without merit.

In *United States* v. *Gardin*, 382 F.2d 601, 605 (2d Cir. 1969), this Court advised how Jencks Act material should be identified to the jury:

> If thereafter the defendant decides to make use of any of the material for cross-examination of the witness, he will be permitted to do so only upon the condition that he state preliminarily to the Court and jury that he is about to question a witness on the basis of a written statement or report which the Government has made available to the defendant as required by law.

Judge Gagliardi specifically alluded to this quotation from *Gardin* at trial and noted that the reason for the rule was to negate "any inference that the Government had been covering something up." (Tr. 294 quoting *United States* v. *Gardin*, *supra*, 382 F.2d at 605.)

Sacco, however, contends that the trial judge erred by giving the instruction:

> Let me tell the jury at this time, in accordance with the law, prior to this witness taking the stand, the Government furnished to defense coun-

sel, all copies of statements by this witness in accordance with the law. (Tr. 261).

Sacco's argument that this instruction could have resulted in having the jury infer that there was other Jencks Act material consistent with the witness' testimony is extremely speculative in view of the fact that several different statements of Robbins were used to cross-examine him. Had counsel utilized but the single document (Gentile Ex. A) which prompted the court's general instruction, Sacco's argument might be a bit more persuasive. But upon the use of several other Jencks Act statements to cross-examine Robbins (Tr. 265, 274, 282, 287), the already subtle inference upon which Sacco rests his argument becomes quite an improbable one.

While the trial judge did not concede he had erred in giving his general instruction rather than that provided in *Gardin*, he did ask all defense counsel if there were any directions that should be given to the jury to cure what had been claimed as error. (Tr. 296). The collective decision of defense councel not to ask for a curative instruction on what can now best be described as an insubstantial semantical misstatement must necessarily bar Sacco's attempt to claim error on appeal. (Tr. 296-98).

POINT VI

The Trial Judge Properly Ruled On Evidence Of Sacco's Reputation.

Sacco makes the two-fold argument that the trial court improperly admitted evidence of his reputation offered by the Government while excluding Sacco's own evidence on the same issue. Such an argument clearly demonstrates Sacco's misunderstanding of the law.

Sacco's argument on this issue goes only to his conviction under Count Two of the indictment wherein he was

charged with violating Section 892 of Title 18, United States Code.* Sacco incorrectly suggests that Section 892(c) was the basis for the admission of testimony of Robbins concerning his fearful attitude towards Sacco. However, it is clear that this Court permits the introduction of reputation evidence for the purpose of demonstrating the victim's fearful state of mind and such was the basis of the admission in this case. *United States* v. *Natale, supra*, 526 F.2d at 1168-69, n.10 *United States* v. *Tropiano, supra*, 418 F.2d 1081 (Title 18, U.S.C. Section 1951); *United States* v. *Sciolono*, 505 F.2d 586 (2d Cir. 1974) (Title 18, U.S.C., Section 111). (Tr. 31-32, 220). All of Robbins' testimony regarding his state of mind as to Sacco and his (Robbins') understanding of what might have happened in the event of non-repayment was therefore admissible under the rationales of *Natale, supra*, and *Tropiano, supra*, without reliance on the language of Section 892(c).

Furthermore, Sacco's claims of being denied the opportunity to offer reputation or character testimony in his own behalf are ill-founded. The court's refusal to allow testimony from Peter Arnone (Tr. 948) and Anthony Trimarco (Tr. 973) regarding conversations in which Robbins allegedly disclaimed any fear of Sacco was entirely proper in view of the fact that both claimed conversations pre-dated Robbins' initial feeling of fear. (Tr. 948, 973-77). The trial judge likewise properly excluded a similar line of questioning which Sacco proposed to pursue with Carlton Miller and Kathryn Fabian. (Tr.

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* Because Sacco's conviction on the other six counts does not rest on Section 892 and he received twenty year concurrent sentences on all seven counts, under the concurrent sentence doctrine this issue need not be reached. *United States* v. *Gaines*, 460 F.2d 176 (2d Cir.), *cert. denied*, 409 U.S. 883 (1972); *United States* v. *Febre*, 425 F.2d 107, 113 (2d Cir.), *cert. denied*, 400 U.S. 849 (1970).

1023-24, 1083). Whether or not a third party such as Miller, Fabian or Trimarco also feared Sacco was irrelevant. The court also correctly precluded questioning of Phillip Sylvester and Anthony Iodice about whether Robbins had expressed to them fear of Sacco. (Tr. 1268, 1053). This was an improper attempt to adduce extrinsic evidence of prior inconsistent statements without first confronting Robbins with them. Rule 613(b), Fed. R. Evid.

Sacco similarly complains of the court's limitation of his examination of Phillip Sylvester when the court evidenced some concern over the possibility that Sylvester might incriminate himself by admitting that he and Robbins were disposing of stolen cars. Nevertheless, Sylvester was allowed to convey to the jury Robbins' role in such illegal activity. (Tr. 1054).

POINT VII

No Error Resulted From The Delay In Sacco's Sentencing Or The Delay In The Taint Hearing.

Sacco argues that the trial judge and the Government purposely delayed his sentencing so as to violate his Sixth Amendment guarantee of a speedy trial and Rule 32(a), Federal Rules of Criminal Procedure which assures sentencing "without unreasonable delay." Sacco raises a similar argument with respect to the delay of the taint hearing. He also contends that Judge Gagliardi erred in relying on an incorrect New York State presentence report at the time of his sentencing. Such arguments are without either factual or legal support.

A. No unreasonable or prejudicial delay occurred with respect to Sacco's sentencing or taint hearing.

The Supreme Court has noted in *Pollard* v. *United States*, 352 U.S. 354, 361 (1956) (two-year delay) that:

> Whether delay in completing a prosecution such as here occurred amounts to an unconstitutional deprivation of rights depends on the circumstances. . . . The delay must not be purposeful or oppressive.

Furthermore, this Court has previously addressed a similar problem in *United States* v. *Tortorella*, 391 F.2d 587, 589 (2d Cir. 1968) (three-year delay in sentencing) and noted that four factors should be considered when this type of issue is raised: the length of the delay, the reason for the delay, the prejudice to the defendant, and waiver by the defendant. Sacco urges, as the appellant did in *Tortorello*, that the delay in sentencing has caused the District Court to lose its power to impose sentence. However, as in *Tortorello*, the reasonableness of the delay in Sacco's case negates the need for the novel remedy suggested by Sacco. See also, *Brooks* v. *United States*, 423 F.2d 1149 (8th Cir.), *cert. denied*, 400 U.S. 872 (1970).

In this case Sacco was found guilty on September 26, 1972 and sentenced on June 9, 1976, a delay of approximately three years and nine months. What transpired during that period, however, entirely justifies this delay.*

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* The following occurred during this period:

1. During November 1972, Sacco's related claim of taint was the subject of post-trial hearings in Baltimore which were suspended in order that production of the controverted tapes could be obtained from the State of New York.
2. Similar post-trial taint hearings were begun and suspended in January 1973 in Florida.
3. In April of 1973 a conference was held in New York during which Sacco agreed to an adjournment of the New York hearing until the issue revolving around the production of the tapes could be resolved with New York State authorities.

[Footnote continued on following page]

Sacco argues that the prejudice from the delay in sentencing came in the form of the twenty year consecutive sentence imposed upon him by Judge Gagliardi. Sacco basically argues that if he had been sentenced earlier Judge Gagliardi would not have been able to take into account his unlawful activity which intervened his conviction in New York in 1972 and his eventual sentence in June 1976. The logic of such an argument escapes the Government entirely since it was Sacco's own protracted post-trial litigation that caused the delay.*

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4. In June of 1973 the District Court in Baltimore ordered that Sacco be furnished duplicate copies of the 439 tapes (15,000 conversations) involved in the New York wiretap.
5. After duplication and transportation of the duplicate tape recordings, Sacco began listening to the tapes in approximately January 1974 and listened to them until October 10, 1974 when he advised Judge Gagliardi that he was ready to proceed.
6. In November 1974, Sacco shifted focus of his taint claim to an allegation that the New York tapes had been tampered with.
7. On January 6, 1975 a hearing was commenced in New York to addressed the tampering claim. This hearing continued with sessions in February and March 1975 during which time a court appointed expert examined the tapes. (Judge Gagliardi rendered decision on this issue on July 28, 1975).
8. From April 7, 1975 to June 12, 1975, a taint hearing was conducted in the Middle District of Florida.
9. From June 16, 1975 to February 27, 1976, Sacco was a fugitive.
10. During March and April 1976, the Government proceeded with the taint hearing in New York as to Sacco's co-defendant Gentile.

* Sacco again misstates the law when he suggests that the Court in *Juarez-Casares* v. *United States*, 496 F.2d 190 (5th Cir. 1974) vacated a sentence where the sentencing judge relied on events that occurred during the two year and seven month sentencing delay. The Court's decision in *Juarez-Casares* actually rested on its finding that such a delay was unreasonable—a finding that cannot be made in the case at bar.

B. No error was committed by the court's reliance on erroneous information at sentencing.

Appellant Sacco urges the Judge Gagliardi erred in relying on and considering an erroneous New York State pre-sentence report at the time of his sentencing on June 9, 1976. Sacco has never addressed this issue in any post-sentence motion to the District Court and raises it for the first time here on appeal. In any event, the claim is directly contrary to the facts.

Judge Gagliardi carefully reviewed with Sacco in open court all his prior indictments as noted in the pre-sentence reports from the District of Maryland and the Middle District of Florida in order to avoid relying on an charge not resulting in conviction. (Tr. of 6/9/76, 6-10).* Sacco showed familiarity with all the federal pre-sentence reports prepared with respect to him. (Tr. of 6/9/76, 6, 10). After the court advised Sacco that it also had in its possession a copy of a Westchester County, New York presentence report, Sacco requested that Judge Gagliardi not consider such a report since he felt it was "prejudicial . . . full of conjecture, hearsay and unfounded. . . ." (Tr. of 6/9/76, 10-13). Judge Gagliardi noted:

> I am not sure that I give any credence to what is in there [the Westchester pre-sentence report]. There is adequate contained in the pre-sentence report for me to form a judgment as to what I should do here, and I disregard those for the purposes that we have here.

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* In reviewing Sacco's criminal history, Judge Gagliardi noted that Sacco had prior convictions and sentences as follows: Post Office burglary, securities fraud, theft from the mails, interstate transportation of stolen property and obstruction of justice (seven years); violation of probation (two years); extortion (thirteen years); extortion (twenty years); criminal usury (eight years). (Tr. of 6/9/76, at 6-9, 15, 20).

In view of this clear statement of non-reliance, Sacco cannot now be heard to complain of an improper sentence. See *United States* v. *Driscoll*, 496 F.2d 252, 253-54 (2d Cir. 1974); *United States* v. *Brown*, 479 F.2d 1170, 1172 (2d Cir. 1973); *McGee* v. *United States*, 462 F.2d 243 (2d Cir. 1972).

POINT VIII

The Trial Judge Properly Charged The Jury.

Sacco contends that the trial judge erred in several of the instructions given to the jury. However, the record does not support his claims. Furthermore, despite the Government's belief that Sacco raises no substantial issues with respect to the court's charges on Counts Two and Three of the indictment, this Court may wish to decline consideration of these contentions on the basis of the concurrent sentence doctrine. *United States* v. *Gaines*, *supra*, 460 F.2d at 178-80; *United States* v. *Febre*, *supra*, 425 F.2d at 113.

Sacco argues that the court erred in taking judicial notice of the New York usury law making unenforceable any "loan by a non-licensed lender in excess of seven and a half per cent per year. . . ." (Tr. 1465). Sacco claims that there was no evidence to support the court's implication in its charge that Sacco was a non-licensed lender. Sacco should be precluded from raising this issue on appeal since no objection was made by him to this portion of the court's jury instructions. Rule 30, Fed. R. Crim. P. In any event, not only does Sacco not contend that he was a licensed lender thereby making erroneous the court's implication, Sacco also fails to recognize that the unenforceability of a loan with a usurious rate of 260 per cent annum is not determined by the licensed or unlicensed character of the lender. No such construction is supported by either state or federal law.

Sacco also urges that, since usury is an affirmative defense which must be pleaded in order to raise the question of enforceability under New York State law, the court's instruction on this point took improper judicial notice of the character of the loan. Section 892(b)(1) however only requires that:

> The repayment of the extension of credit . . . *would* be unenforceable, through civil judicial processes against the debtor.

See also, Section 891(a) of Title 18, United States Code. Furthermore, while no statutory language or case law directly responds to this frivolous contention of Sacco's, under Section 1961(b) of Title 18, United States Code, the term "unlawful debt" is defined as:

> "(b) . . . a debt . . . which is unenforceable under State or Federal law in whole or part as to principal or interest because of the laws relating to usury. . . ."

Such a finding of "unenforceability" is therefore not premised on a determination that usury has been affirmatively pleaded as a defense in some prior civil litigation.

Sacco also complains that by reading virtually the complete text of the third element of the crime provided by Section 892 (Count Two) the court improperly provided the jury with alternative theories upon which it could convict under the Count.* The court charged:

> ". . . thirdly that the extension of credit that at the time the extension of credit was made the debtor reasonably believed either, a, one or more extensions of credit by the creditor had been collected by extortionate means, or the nonpayment thereof had been punished by extortionate means

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* Only counsel for Rhines, and not Sacco, registered an objection to this portion of the charge to the jury. (Tr. 1499-1500).

> or, b, the creditor had a reputation for the use of extortionate means to collect extensions of credit to punish the non-payment thereof. (Tr. 1466)

Section 892(c) provides however the "court may in its discretion allow evidence . . . tending to show the reputation as to collection practices of the creditor in any community of which the debtor was a member at the time of the extension" of credit when "direct evidence of the actual belief of the debtor as to the creditors collection practice is not available." This provision anticipates reluctant or absent victims and the resulting unavailability of direct evidence. However, in the case at bar, Robbins gave direct testimony as to his belief of Sacco's collection practices. The Government called no other witnesses to establish Sacco's collection practices with other debtors in the community. Furthermore, nowhere in the prosecutor's summation is there any indication that the Government sought to prove Robbins' state of mind by anything but direct evidence. There is no allusion to an effort to prove Sacco's reputation in the community. Hence, while it was probably unnecessary for the court to instruct the jury on all the provisions of Section 892, it cannot be reasonably argued that the jury could have found, based on any available community reputation evidence as to Sacco's collection practices, that Robbins, in the words of the court's instructions, "was fearful that violence or criminal means would be used to check the debt at the time the loan was initially made." (Tr. 1467).

Sacco also complains that the court's instruction in connection with Counts Four through Eight was erroneous when the following instruction was given: "the same provisions as I have given you with respect to count two insofar as what constitutes an extortionate extension of credit applies here and I am not going to repeat them

because you have already heard those." (Tr. 1468).* Sacco urges that this instruction suggested to the jury that the elements of the Section 894 offenses in Counts Four through Eight were identical to the elements of the Section 892 offense in Count Two. While the court in the above-quouted language may have incorrectly suggested that Counts Four through Eight may have required "extortionate extensions of credit" in addition to "collection by extortionate means",** Sacco cannot seriously urge that the Court substituted the entire instructions as to Count Two for those applicable to Counts Three through Eight. Judge Gaglardi carefully instructed the jury on all the elements of the Section 894 violations charged in Counts Four through Eight, including a definition of extortionate means. (Tr. 1468-71).

Sacco's suggestion that there was error in the court's instruction that

> A defendant is guilty of substantive offense charged if it was committed in furtherance of and during the course of an unlawful conspiracy of which he was a member. (Tr. 1474).

demonstrates his complete misunderstanding of the law.*** *Pinkerton* v. *United States*, 328 U.S. 640, 645-48 (1946); *United States* v. *Finkelstein*, *supra* 526 F.2d at 522. The court's complete instruction on this theory reveals full compliance with the law. (Tr. 1474-1475).

Sacco further contends that the court's charge on the scope of the conspiracy incorrectly stated that extortion-

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* No objection was registered by Sacco as to this portion of the charge.

** If the jury somehow believed from this instruction that an extortionate extension of credit had to be proven as to Counts Four through Eight, the additional burden caused to the prosecution by this unnecessary element hardly prejudiced Sacco.

*** Once again, only counsel for Rhines, and not Sacco, objected to this portion of the jury instruction.

ate *extensions* of credit were part of the illegal agreement charged in Count Three which actually only charged unlawful *collection* of debts by extortionate means. Although there was a misstatement in this regard, the error of this charge was brought to the court's attention by defense counsel, (Tr. 1496-98), and the court corrected its mistake. (Tr. 1502).

Finally, Sacco misreads entirely the independent elements of Section 892 which are relied upon to determine the "extortionate character" of any extension of credit.* He argues there is a fatal inconsistency between the lawful rate then prescribed by New York law (7½ percent) and the 45 percent per annum requirement of Section 892(b)(2). Section 892(b)(1) utilizes the unenforcability of a given loan under state law as but one indicia of its extortionate nature. The subsequent independent requirement that an extension of credit also exceeded 45 percent per annum, regardless of the lawful rate used to determine civil enforceability, is but another standard that must be met to demonstrate that a prima facie "extortionate" extension of credit exists.

In conclusion, despite the litany of plain error claimed by Sacco as to the court's instructions to the jury, the record does not reveal any grounds for reversal.

POINT IX

The Evidence Was More Than Sufficient To Support The Conviction Of Sacco.

Sacco challenges the sufficiency of the evidence by claiming that the Government did not prove the essential element of fear. This argument is utterly frivolous.

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* No objection was registered by Sacco to this portion of the charge. (Tr. 1499).

As to sufficiency, of course, the proof must be viewed in the light most favorable to the Government. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *United States* v. *Taylor*, *supra*, slip op. at 2809. The sufficiency of the Government's evidence as to Robbins' fear is clear from the many conversations between Robbins and Sacco, Gentile and Rhines regarding repayment. (Tr. 173-74, 194-5, 200-03, 215). Robbins clearly expressed his fearful state of mind during his direct examination. (Tr. 217-18, 220, 221, 222, 223).*

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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* Sacco's oversized brief of 118 pages also raises numerous miscellaneous contentions so frivolous that their lack of merit is overly apparent.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

MAUREEN EGAN, being duly sworn, deposes and says that she is employed in the office of the United States Attorney for the Southern District of New York.

That on the 27th day of June, 1977 she served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

Howard Jacobs
401 Broadway
New York, New York 10013

Frank Sacco
Atlanta Federal Penitentiary
Box PMB
Atlanta, Georgia 30315

And deponent further says that she sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Maureen Egan
MAUREEN EGAN

Sworn to before me this

27th day of June, 1977

Elizabeth A. McKeever

ELIZABETH A. McKEEVER
Notary Public, State of New York
No. 43-4629132
Qualified in Richmond County
Commission Expires March 30, 19 78